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CURRENT TOPICS.

In *National State Bank of Camden v. Pierce*, recently decided by the United States Circuit Court for the Eastern District of Pennsylvania, it was held that a national bank located in New Jersey, but which received deposits in an office in Philadelphia, did not thereby become located in Pennsylvania, so as to be liable to taxation. The proceeding arose on a bill for an injunction to restrain the bank assessors of the state of Pennsylvania from returning an assessment upon the capital stock to the auditor-general of the state, and to have the assessment declared illegal. It appeared from the bill that the plaintiff was a national bank engaged in business in New Jersey; that for the convenience of persons in Philadelphia desiring to deposit money therein, it kept a clerk in an office in that city to receive deposits and deliver them to the bank in Camden, N. J., at the close of each day; that the defendants, who were the bank assessors of the State of Pennsylvania, had served on the plaintiff a notice of an assessment of a tax upon the entire capital stock of the bank; that said assessment, which was made under acts of the Assembly of Pennsylvania of April 12, 1867, April 2, 1868, and December 22, 1869, was contrary to law and void; that the plaintiff had taken an appeal from the assessment in due time, but the assessors refused to vacate or alter the assessment. It was insisted on the part of the defendants that a bank may be either of discount or deposit. If it performs the function of either in a place, it becomes located there. If it does business in two places, it must be taxed in both. CADWALADER, J.: "It is a criminal offense to carry on banking business in the way suggested in Pennsylvania without a license obtained in a particular manner, but that does not make the offender a bank located in Pennsylvania." MCKENNAN, J.: "We have decided, after full discussion, that even when a corporation carries on business in a state, it does not thereby become an inhabitant of it, and we can not go farther and say that by similar conduct a corporation becomes located therein." An injunction was granted.

IF a person inflicts upon another a dangerous wound—one that is calculated to endanger and destroy life—and death ensues therefrom within a year and a day, it is sufficient proof of the offense either of manslaughter or murder, as the case may be; and he is none the less responsible for the result, although it may appear that the deceased might have recovered if he had taken proper care of himself, or that unskillful or improper treatment aggravated the wound and contributed to his death. This doctrine was announced after an examination of the old authorities by the Supreme Court of Errors of Connecticut, in *State v. Bantley*, 17 Am. Law Reg. 447. See Roscoe Crim. Ev., 7th ed., 717; 1 Hale P. C. 428; 3 Greenleaf on Evidence, § 139; Rex v. Rews, Kelynge, 26. In Regina v. Holland, 2 Mood. & Rob. 351, the deceased had been severely cut with an iron instrument across one of his fingers, and had refused to have it amputated, and at the end of a fortnight lock-jaw came on, and the finger was then amputated, but too late, and the lock-jaw ultimately caused death. The surgeon expressed the opinion that early amputation would probably have saved his life. Maule, J., held that a party inflicting a wound which ultimately becomes the cause of death, is guilty of murder, though life might have been preserved if the deceased had not refused to submit to a surgical operation. In Com. v. Pike, 3 Cush. 181, it was held that where a surgical operation is performed in a proper manner, and under circumstances which render it necessary, in the opinion of competent surgeons, upon one who has received a wound apparently mortal, and such operation is ineffectual to afford relief and save the life of the patient, or is itself the immediate cause of the death, the party inflicting the wound will nevertheless be responsible for the consequences. In Rex. v. Johnson, 1 Lewin C. C., the deceased died from a blow received in a fight with the prisoner; a surgeon expressed an opinion that a blow on the stomach, in the state in which the deceased was, arising from passion and intoxication, was calculated to occasion death, but not so if the party had

been sober. Hullock, B., directed an acquittal, observing that when the death was occasioned partly by a blow and partly by a predisposing circumstance it was impossible to apportion the operation of the several causes and to say with certainty that the death was immediately occasioned by any one of them in particular. Of this case Roscoe remarks that it may be doubted how far this ruling of the learned judge was correct: Roscoe's Crim. Ev., 7th ed., 718. In Rex v. Martin, 5 Car. & P. 130, where the deceased at the time when the blow was given was in an infirm state of health, Park, J., said to the jury: "It is said that the deceased was in a bad state of health, but that is perfectly immaterial, as, if the prisoner was so unfortunate as to accelerate her death, he must answer for it." In Commonwealth v. Hackett, 2 Allen, 136, it was held that one who has willfully inflicted upon another a dangerous wound with a deadly weapon, from which death ensued, is guilty of murder or manslaughter, as the evidence may prove, although through want of due care or skill the improper treatment of the wound by surgeons may have contributed to the death.

Bank of Owensboro v. Western Bank, recently decided by the Court of Appeals of Kentucky, is an interesting decision as to the liability to his principal of an agent who has acted negligently or has disregarded his orders. The plaintiff had authorized its agent to make a loan on a note with any good collateral security. The agent made a loan on Bank of Louisville stock security, which would have been good security had it been free from prior liens, but the existence of prior liens was claimed by the Bank of Louisville. The plaintiff, with knowledge of this claim, accepted the note and collaterals, and brought suit to compel the Bank of Louisville to make a transfer of the stock on its books to the plaintiff, and to subject it to the payment of the note. In this suit it was defeated, the priority of the lien of the Bank of Louisville being established. The plaintiff then brought this action against its agent for negligence for making the loan without good security. The court held that the plaintiff had not ratified the agent's act, but on proof of negligence in taking the collateral it was entitled to recover against the agent; that where an agent to loan money takes insufficient security the principal is not bound at his peril to accept and discharge the agent, or to reject the security, and look only to the responsibility of the agent, but may take the security and still hold the agent for the deficiency; and that the good faith of an agent in such a case does not exonerate him from liability to his principal. The doctrine, the court said, that if an agent has, by a deviation from his orders, or by any other misconduct or omission of duty, become responsible to his principal for damages, he will be discharged therefrom by the ratification of his acts or omissions by the principal, if made with a full knowledge of all the facts, is elementary. "But the instructions given in this case went further, and held that if the principal, at the time of accepting the note and collaterals, knew all the facts touching the loan and affecting the value of the security, which were then known to the agent, and with such knowledge received them and treated them as its own, the agent was discharged from liability. We have examined many authorities, both elementary and judicial, in which the doctrine of ratification, as between principal and agent, is discussed, but we have not found one which considered the good faith of the agent as an element in deciding whether or not there has been a ratification; but, on the contrary, whenever the good faith of the agent has elicited remark, it has been to the effect that it could have no weight in the decision of the question. 'Indeed, in all such cases the question is not whether the party (agent) has acted from good motives and without fraud, but whether he has done his duty and acted according to the confidence reposed in him.' Story on Agency, sec. 192. Nor do we find any authority for exonerating a delinquent agent from liability if he communicates to the principal all the facts known to him at the time and the principal ratifies the delinquency, and it afterward turns out that the facts as communicated were not the real facts of the case. In such a case the assumed condition is not that claimed to have been ratified. * * * An examination of the cases will show that in every one in which the agent was held to be discharged from liability for deviations from orders or duty, the principal knew at the time of the ratification that the agent had not done his duty; whereas, in this case, as we have already seen, the appel

lant did not and could not know that the appellee had not taken ample security until it was decided that the Bank of Louisville had not waived its lien on the stock. This conclusion is sustained by the cases of Bank of St. Marys v. Colder, 3 Strobh. 403; Walker v. Walker, 5 Heiskell, 425." On a rehearing the judgment was affirmed, the court confining its opinion to pointing out the distinction between the case at bar and the cases of Courcier v. Ritter, 4 Wash. 549; Cairnes v. Bleecker, 12 Johns. 300; Pickett v. Pearson, 17 Vt. 470; and Hanks v. Drake, 49 Barb. 202.

THE LIABILITY OF COUNTIES, CITIES AND TOWNS TO PAY BACK ILLEGAL TAXES VOLUNTARILY PAID.—I.

Judge Cooley, in his work on Taxation, states the doctrine we propose discussing as follows: "That a tax voluntarily paid can not be recovered back, has been held by the authorities with very few exceptions. It is immaterial in such a case that the tax has been illegally laid, or even that the law under which it was laid was unconstitutional." p. 566. The principle for the doctrine, he states in these words: "The principle is an ancient one in the common law, and is of general application. Every man is supposed to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he can not afterwards assign his ignorance of the law as a reason why the state should furnish him with legal remedies to recover it back. Especially is this the case where the officer receiving the money, who is chargeable with no more knowledge of the law than the party making the payment, is not put on his guard by any warning or protest, and the money is paid over to the use of the public in apparent acquiescence in the justice of the exaction. Mistake of fact there can not well be in such a case, as the illegalities which render such a demand a nullity must appear from the records, and the tax-payer is just as much bound to inform himself what the records show or do not show, as are the public authorities. The rule of law is a rule of public policy also; it is a rule of quiet as well as of good faith, and precludes the courts being occupied in undoing the arrangements of parties which they have voluntarily made, and into which they have not been drawn by fraud or accident, or by any excusable ignorance of their legal rights." "All payments of taxes," he continues, "are supposed to be voluntary which are not made under protest or under the apparent compulsion of legal process." He then goes on to state what will be a sufficient protest or compulsion to entitle a person to recover back illegal taxes, which he applies to ordinary suits against cities, towns and counties, as well as against collectors of taxes. p. 567 *et seq.* Judge Burroughs, in his work on Taxation, states the doctrine substantially as Cooley does, and cites, with an exception or two, the same authorities. We quote his work: "It is a well-settled principle of law that a voluntary payment of money under a mistake of law lays no foundation for an action to recover back the money so paid. When a man demands money of another as a matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum of money voluntarily, he can not recover it back." Citing, Brisbain v. Dacres, 5 Taunt. 154; Bromley v. Holland, 7 Vesey, 23. And the position is then taken that "these principles have been applied both in England and in this country to taxes illegally exacted by the tax officers in suits brought against them for money had and received." He remarks that the difficulties which arise are generally as to whether, under the facts of the particular case, the payment was voluntary or under compulsion. p. 266. On page 267 of his work, Judge Burroughs gives instances of cases where a tax was held not to have been paid under such compulsion as the law contemplated. He also applies the doctrine in cases of counties, cities and towns.

It is our purpose to show that the doctrine enunciated by Cooley and Burroughs is not applicable in cases of suits brought for illegal taxes, though voluntarily paid, against counties, cities and towns. We contend that the principles cited by these eminent authors are either not applicable or are unsound and insufficient.

The case in 5 Taunton, *supra*, was a case in which the plaintiff, captain of one of His Majesty's vessels, sought to recover back moneys paid to the admiral commanding the fleet, Admiral Dacres, under an erroneous impression that the rule or custom theretofore prevailing, under which this sum would have been so payable, still existed. Gibbs, J.,

held the whole transaction to be illegal in these words: "We are all of opinion that this carrying of the dollars was an illegal transaction, that the whole which followed was tainted with the same illegality, and that the money paid can not be recovered at all, inasmuch as the captain could not lawfully employ the ship and crew, which ought to be employed in the service of His Majesty, in carrying bullion for individuals." The moneys sought to be recovered were one-third of the moneys received by the captain for carrying bullion from Jamaica to England for private parties and the English government under orders from the admiral. The court then proceeded to discuss the question how far moneys paid under a mistake of law (and the court there viewed the matter as a mistake of law) or in ignorance of law could be recovered back. This was *obiter*. It never occurred to Justice Gibbs that the doctrine which says "money paid under a mistake or in ignorance of law can not be recovered back," which has been considerably departed from in modern days, had no application to the case before him, for there the payment, if made under circumstances which made it illegal, could not be a payment under a mistake or in ignorance of law, it would have been a payment without the support of law, without a consideration. In the cases of the latter kind if there is a moral obligation resting upon the person paying, it can not be recovered back because of the doctrine enunciated above. The cases, indeed, where the doctrine was properly applied and held, are cases of the kind just mentioned, or are cases where parties have been treating with one another on an equal footing and have acquired rights, which it was found inequitable to disturb—where the opportunities for observation and knowledge were open to both, and where there was no fraud or imposition or advantage taken. There are numerous cases where the doctrine is properly applied, and there are authoritative cases where properly it was not applied. The principle enunciated by the cases in which it is not applied, is applicable to the class of cases we have reference to in this discussion.

The case reported in 7 Vesey, *supra*, was an equity case, where the party who objected to a given transaction had enjoyed the benefit thereof for some time, and afterward sought to set the same aside. The principle of equity there, would be equitable estoppel, and that is what the case substantially shows, notwithstanding the head-note. Later cases have arisen where moneys paid under a mistake or in ignorance of law have been recovered back, indistinguishable in principle from the class of cases herein referred to, where a retention of the money would work a wrong or a fraud.

Suppose I pay an officer a large sum under the erroneous impression that he is legally entitled thereto, am I precluded from recovering that back, if it turns out I made a mistake? There was no consideration for the payment, no moral obligation on me to pay it; really the officer if he had discharged his duty properly could have known the law and not accepted it. Now, ought I to be precluded from recovering back money so paid, without any warrant or consideration whatever, simply because I was ignorant of law and made a mistake in my supposition? It would seem that in such a case there is obviously no principle in applying the rule *ignorantia legis neminem excusat*.

In Black v. Ward, 27 Mich. 191; 15 Am. Rep., and in a note to this case in the latter volume, the application of the rule here contended for is exhaustively discussed, and the position taken herein fully sustained. The same may be said of what is laid down in the 11th American edition of Chitty on Contracts, p. 935, note, p. 1. As has been already said, the rule itself seems to have no proper application to cases where moneys have been paid to persons without consideration or law. And the fact that a payment under such circumstances was attended by a mistaken view or ignorance of the law, could cut no figure in the matter. Hence, the doctrine for which the cases in Taunton and Vesey are cited is not sustained by them, and has no proper application to payments of illegal taxes.

Some of the cases where this doctrine was applied were cases in which the court held that the illegal taxes for which suit had been brought could not be recovered back, because paid voluntarily; and the principle—if such it may be called—enunciated in Cooley and Burroughs, has been invoked to sustain them; but when the principle is invoked, it is generally adopted because used in that way in some prior decision, and the cases from Taunton and Vesey are relied on to sustain it. In ad-

dition, it will be found, upon looking through the cases, that where they affirm the doctrine generally that illegal taxes voluntarily paid could not be recovered back, they were cases: (*a*), where there was a legislative enactment requiring protest to a recovery back; or, (*b*), where the suit was against an officer, who had paid the moneys received over to the state, or, perhaps, the county, city or town; or, (*c*), where a consideration, as leave to sell liquors, etc., had been received therefor. The latter circumstance, though seldom referred to, seems, notwithstanding, to be an element weighing with the court in arriving at a decision. Such cases are those where the sum sought to be recovered was money paid for a license to carry on a special business of some kind, where the party had had the benefit of the license, and urged some technical objection against its validity.

Suppose, now, that illegal taxes are imposed by virtue of some excess of power on the part of the county officials, or because the act under which they are assessed is unconstitutional, and are paid. Are these paid through ignorance of the law? We claim that they are not so paid. They seem rather to be paid under a supposition that they are legal taxes. Now, such a supposition does not imply ignorance more than it does mistake; and the cases where "mistake of law" was affirmed fully warrant us in predicating "mistake" of law of the class of cases here supposed, Brisbane v. Dacres not excepted. Beside, is there really any substantial difference between ignorance and mistake of law? When mistake is affirmed, does it not imply ignorance? And when ignorance is affirmed, is there not mistake? And there is no essential difference in principle between this class of cases and those cited in the note in Chitty, *supra*, in the case in 27 Mich., and the note in 15 Am. Rep., *supra*.

Some of the cases stating the doctrine from 5 Taunton use language which assume that the party paying the illegal taxes stands on an equal footing with the officer collecting them; but this is where the suit is against the collector for taxes which have gone out of his hands, and, generally, where the same have gone into the hands of the state But is it true that they stand on an equal footing? It is very strange and anomalous that any court should assume that they do, for practically it is well known that they do not—that they do no stand on any more equal footing than does the client in a transaction with his attorney, or than exists between guardian and ward; and sometimes the supposed equality is so imaginary that, in fact, it no more exists than in cases of positive duress. We contend that they do not stand on an equal footing. There is no reciprocity as such between them. The officer, so to say, performs an official duty and has nothing to lose, while the individual's property is at stake. Practically—and what is practical is, or should be, a controlling consideration in deciding the question—the individual is at a considerable disadvantage; there is an influence over him which is in its nature compulsory. Frequently—we might say most frequently—the question whether a tax is illegal is a doubtful one among the profession, and in such cases a layman can not ordinarily be expected to hazard the chances of having his property sold or a penalty imposed, or in the last alternative to incur attorney's fees for the purpose of preventing the sale of his property, and with as many chances against as for him, to avoid the payment of a sum which, though illegal and unjust, is far less than the expenses attending a contest. In nine cases out of ten he will not be able to restrain the collection of a tax for fear of a conflict with *public policy*, and when he does get an injunction, in nine cases out of ten he stands a chance of being mulcted in the costs, because his or his attorney's interpretation of the law has been too favorable, and he has not tendered and paid a sufficient amount into court. So that, practically, there is coercion, even though the tax is said to be paid voluntarily. If the tax is illegal, in nine hundred and ninety-nine cases out of a thousand doubtless the fact is not known, and the same is paid under a mistake of law, if not a mistake of fact.

(*To be Continued.*)

IN a divorce case, in New York, the other day, an application was made to have some of the alimony decreed against the defendant remitted, on the ground that his income did not allow of its being paid. The plaintiff's counsel contended that the order should not be modified, because the defendant had rich relatives, who would advance him money to save him from disgrace. "The first argument," said Van Hoesen, J., "is a very strange one to present, and amounts to this: That the court should use its process to extort money from the kindred of a debtor who has not the means of meeting his obligations. Pirates and brigands seize men that their friends may ranso n them; but courts of justice do not proceed in that way."

BILL OF EXCHANGE—CONDITIONAL ACCEPTANCE.

COFFMAN v. CAMPBELL.

Supreme Court of Illinois, September Term, 1877.

[Filed at Ottawa, June 21, 1878.]

Hon. JOHN SCHOLFIELD, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" BENJAMIN R. SHELDON,
" PICKNEY H. WALKER,
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
} Associate Justices.

WHERE a party proposes to make a conditional acceptance of a bill of exchange, and commits that acceptance to writing, he must be careful to express fully the condition therein. Hence, where a party sent an acceptance by telegram in the following words: "Will pay A. Harper draft twenty-three-hundred dollars for stock:" *Held*, that the acceptance was not conditional. DICKEY and CRAIG, J. J., dissenting.

BREESE, J., delivered the opinion of the court:

This was assumpsit in the Cook Circuit Court, brought by D. C. Campbell and Company, doing business as bankers, plaintiffs, and against S. F. Smith, S. Coffman and A. B. Reame, defendants, on their alleged acceptance of a certain bill of exchange for twenty-three hundred dollars, drawn upon them by one A. Harper, and in which plaintiffs advanced the money therein specified. The facts are briefly these: On April 5, 1872, plaintiffs sent a telegram to defendants as follows: "Will you honor draft drawn by A. Harper for twenty-three hundred dollars?" On the following day plaintiffs received from defendants this telegram: "U. S. Yards, Ill., April 6, 1872. To D. C. Campbell. Will pay A. Harper draft twenty-three hundred dollars for stock. Smith, Coffman & Reame." A. Harper, on receipt of this telegram by plaintiffs on April 6, 1872, drew this draft: "Centerville, April 6, 1872. At sight pay to the order of D. C. Campbell and Co. twenty-three hundred dollars, value received, and charge to account of A. Harper. To Smith, Coffman & Reame, Union Stock Yards, Chicago." This draft, when presented to the defendants, they refused to accept. Hence this action.

The declaration in the several counts alleged the necessary facts with legal precision and in due form. The general issue was put in to the first, fourth and to the common counts, and a general demurrer to the second and third counts, which was overruled, and the general issue pleaded thereto, and four special pleas, averring in substance in the second plea or first special plea that the draft was not applied in the purchase or for payment of stock, nor did defendants receive any stock therefor; and in the second special plea, that the bill of exchange was not drawn by Harper, and the money obtained of plaintiffs to pay for stock already theretofore purchased by Harper and shipped to the defendants. The third special plea averred more in detail the arrangement between Harper and the defendants as to acceptance of Harper's draft, provided the same were used in the purchase and payment of stock by Harper and by him shipped to defendants; and the remaining fourth special plea averred that neither before the making the draft or conditional acceptance or since did defendants receive from Harper or plaintiffs any stock for which the draft was drawn or on account of which said conditional acceptance was made. To these special pleas there was a demurrer, which was sustained. The remaining issues were tried by a jury, who, under instructions, returned a verdict for the plaintiffs for the amount of the draft and interest thereon. A motion for a new trial was denied, and judgment rendered on the verdict, to reverse which the defendants appeal.

These rulings bring up the important question: Was the acceptance of this draft by defendants conditional?

It is argued by appellants, if there was any contract it was one of conditional acceptance, or of an agreement to accept on the happening of a contingency, namely, the shipping of stock, which not having happened there can be no recovery, and the burden of proof is on the plaintiffs.

It will be seen, by reference to the terms of the acceptance, there is no intimation in it that stock of any kind was to be shipped; that was no part of the contract, and it nowhere appears that plaintiffs proposed to advance money, or did advance any, on the faith of any shipments of stock. It nowhere appears that appellants, when they telegraphed their agreement to accept Harper's draft suggested they would not pay it unless it was accompanied by a bill of lading or until a shipment of stock was made, or that such was their intention. Had it been their intention, they certainly should have made that a part of their acceptance, it should have been one of the terms, if fair dealing was intended; and it was their duty so to have informed appellees. It is the duty of a party, under such circumstances, to express clearly the condition of his acceptance, if he designs to make it conditional, and the burden is upon him to show it, and not upon the holder of the bill. Chitty on Bills, 303. If an acceptor does not desire to become absolutely liable, it is a very easy matter so to word the contract. It is his duty to express himself and his intentions in such terms as to leave no doubt his acceptance was conditional; and, as it is his business so to express himself, the interpretation of the agreement must be against him on a familiar principle. United States v. Bank of Metropolis, 15 Peters, 396; Topey v. Church, 4 Watts and Serg. 346.

The rule, we believe, is generally accepted and understood to be, if a party proposes to make a conditional acceptance only, and commits that acceptance to writing, he must be careful to express fully the condition therein. It is not permitted to use general terms, and then exempt himself from liability by relying upon particular facts which may have some connection with the condition expressed, for the reason that the particular fact is of itself susceptible of being made a distinct condition. 15 Peters, 377, *supra*. It is also held,

in the case of the acceptance of commercial paper, that which can be made a distinct condition must be so made, and nothing out of the condition can be inferred, unless in a case where the words used are so ambiguous as to make it necessary that parol evidence should be resorted to, to explain them. There the onus of proof would be on the acceptor, and the proof would be of no avail if the holder, or any person under whom he claims, took the bill without notice of such condition, giving a valuable consideration therefor. Ibid.

It does not appear to us that appellants were careful to express any condition to their acceptance, if any was intended. They reply to the telegram that they will pay A. Harper's draft for twenty-three hundred dollars for stock. This is an absolute acceptance, and must have been perfectly satisfactory to appellees, who knew Harper was buying stock; but there is no intimation or suggestion in the acceptance that stock was to be shipped to the acceptors, or that they should have any control of the stock by bill of lading or otherwise. The use of the terms "for stock" in the acceptance was not for the benefit or to subserve any purpose of the payees and of the acceptors as between them, but was important in the arrangement existing between the drawer and acceptors in the settlement of their dealings. This is more reasonable than it is to consider the term a modification of the acceptance. The acceptance is absolute; they will pay Harper's draft for twenty-three hundred dollars. The words "for stock" are at most but an indication of the nature of the consideration as between Harper, the drawer, and these appellants as acceptors, and was of no importance or interest to appellees. It was immaterial to them what was the consideration moving between Harper and appellants. If the words "for stock" amount to a condition that stock must be shipped, then it would follow it was the duty of appellees, who cashed the draft, to see that the money was actually paid for stock to the seller of the stock, which no one will pretend. It was not the business of appellees to make any such inquiry, and is not compatible with the relation they hold to the transaction. It is urged by appellants that by the usage of trade the words "for stock" mean that the money was to be paid for stock and the stock be consigned to the acceptor of the draft, accompanied by a bill of lading. Two of the appellants testify as to the supposed usage, as they understood it among commission merchants in Chicago, but not as among bankers, and in a foreign state where this draft was negotiated. This proof does not establish usage as defined by this court in Bissell v. Ryan, 23 Ill. 566, where it was said an usage must be generally known and established, and so well settled and so uniformly acted upon as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference to it and in conformity with it. The evidence fails to establish any usage. It is unnecessary to pursue this discussion farther. The justice and law of the case is with appellees. We have no fault to find with the manner in which the instructions were disposed of, and the judgment must be affirmed.

DICKEY, J. I can not concur in this conclusion. I think the telegram plainly shows that the money promised by the appellants was to be paid only on the receipt of stock bought with the money.

CRAIG, J. I do not concur with the majority of the court in the decision of this case, but I fully agree with Dickey, J., in his conclusion.

THE LEGAL STATUS OF THE 29TH OF FEBRUARY.

HELPHENSTINE v. THE VINCENNES NATIONAL BANK *ET AL.*

Supreme Court of Indiana, May Term, 1878.

HON. WILLIAM E. NIBLACK, Chief Justice.
" HORACE BIDDLE, } Associate Justices.
" JAMES L. WORDEN, }
" GEORGE V. HOWK, }
" SAMUEL E. PERKINS, }

DEFECTIVE PROCESS—VOID AND VOIDABLE JUDGMENT—WAIVER OF ERRORS.—In Indiana, the 28th and 29th days of February, in every bissextile or leap year, are to be computed in law as one day. But where a default was entered and judgment rendered against a party on a nine days' service of summons by reason of said two days being reckoned as one: *Held*, the judgment was not absolutely void, but only voidable, and the defendant might waive the irregularity and thereby render the judgment valid.

This was an action by the appellant to have a judgment in favor of the Vincennes National Bank set aside and declared null and void, on the ground of insufficient service of the summons. The summons was served on the 25th day of February, 1876, and the term began on Monday the 6th day of March. The statute provides that the defendant shall be served ten days before the first day of the term.

After the judgment was taken the bank procured the judgment-defendants to "waive and release all errors and irregularities, if any there be, in said judgments, and in the proceedings for obtaining the same," in consideration that no execution should issue until June 13, 1876.

By agreement of the parties only two questions were presented to the supreme court for decision: 1. Was the service sufficient? 2. Is the judgment void, so as not to be cured by a release of errors and waiver of all irregularities?

HOWK, J., delivered the opinion of the court:

From the averments of the appellant's complaint in this action it will be seen that the validity and legality of the service of the summons therein mentioned are not called in question; but the real question for decision may be thus stated: Under the facts stated in the complaint had the service of said summons been made ten days before the first day of the term of the court at which the appellant and his co-defendants were defaulted and the judgment against them was rendered? It is provided in and by sec. 315 of the practice act, as follows:

"Sec. 315. Every action shall stand for issue and trial at the first term after it is commenced, when the summons has been served on the defendant ten days, or publication has been made for thirty days before the first day of the term." Therefore, unless the facts stated in the appellant's complaint showed that the service of the summons therein mentioned was made ten days before the first day of the March term, 1876, of the court below, it is clear, we think, that this default and judgment mentioned in the complaint were improvidently and irregularly at least entered and rendered. The service of the summons set forth in the complaint was made ten days before the first day of the said March term, if the intervening 29th day of February, 1876, which was the bissextile or leap year, can be legally counted as a separate and distinct day. If, however, the 28th and 29th days of February of the leap year constitute, in legal acceptance, only one day, then it follows that only nine legal days intervened between the service of the summons and the first day of the March term, 1876, of the court below.

It must be regarded, we think, as settled in this state, that the 28th and 29th days of February, in every bissextile or leap year, must be computed and considered in law as one day. From almost the first organization of our state government, it has been, and now is declared by statute in this state, that "the common law of England and statutes of the British Parliament, made in aid thereof, prior to the fourth year of the reign of James the first, (with certain exceptions not pertinent to the question now before us), and which are of a general nature, not local to that kingdom, and not inconsistent with" the Constitutions and statutes of this State and of the United States, were and are parts of the law governing this state.

It has, therefore, been held by this court that the English statute, 21 Henry III, was in force in this state. By this English statute it was provided, in speaking of the 29th day of February, in leap year, in the law-Latin of the time, as follows: "*Et computitur dies ille, et dies proxime precedens, pro unico die*"—and that day and the next going before shall be accounted for one day. The first case in this court, in which this English statute was recognized as a part of the law governing this state, was that of Swift v. Tousey, 5 Ind. 196. The case cited has since been approved and followed by this court in the cases of Craft v. The State Bank of Indiana, 7 Ind. 219. and Porter v. Holloway, 43 Ind, 35; and the same doctrine was enunciated in the case of Kohler v. Montgomery, 17 Ind. 220.

Long before these causes were decided by this court, it had been provided by sec. 57 of "An act regulating the practice in suits at law," approved January 30, 1824, "that in every leap-year the 28th and 29th days of February shall be considered in law as one day." By sec. 52 of an act on the same subject and with the same title, approved January 29th, 1831, the same provision was re-enacted by the legislature of this state, in exactly the same language. Again, the same provision, in the same language, brought forward and became a part of the revision of 1838.

This provision was not re-enacted in the revised statutes of 1843, nor in any subsequent legislation of this state which has come under our notice. We have referred to this legislation merely as a part of the legal history of this state, and not because it has any direct bearing on the subject now under consideration. Settled and fixed rules for the computation of time are exceedingly desirable, and ought not to be changed or deviated from without good and sufficient cause. For more than half a century the rule of law that the 28th and 29th days of February, in the bissextile or leap year, should be computed and considered as one day, has met with the continuous sanction and approval of both the legislature and judiciary of this state. Under these circumstances, whatever might have been our opinion in regard to those two days, or in regard to the proper construction of the statute of 21 Henry, 3, if the question could be considered as an open one in this state, we think it is clearly our duty to stand by the former decisions of this court on the subject of computing those days, and to uphold the rule of law thereby established. In our opinion, the service of the summons was not sufficient in law to justify either the default entered, or the judgment rendered in the action.

2. We come now to the consideration of the second question presented and argued in this cause: "Was the judgment absolutely void, or was it merely erroneous, irregular and voidable? In considering this question, it must be borne in mind that the only objection presented to the judgment is this—that it was rendered upon a default entered on a service of the summons nine legal days before the first day of the term. In other words, the court entered a default, and rendered judgment in a case where the cause should have been continued by operation of law until the next term of the court. The court had jurisdiction of the subject-matter of the action; the appellant and his co-defendants resided apparently within the jurisdiction of the court; a summons in due form of law was duly issued; this summons was personally served nine legal days before the first day of the term, and this summons required the appellant and his co-defendants to appear on the second day of the next term, etc. This summons, as alleged, was personally served on the 25th day of February, 1876, and proof of this service was duly made before the court when the default was entered. It seems to us that the default and judgment were merely irregular and erroneous—were merely voidable, and not absolutely null and void. Thus, it is said in Freeman on Judgments, sec. 126: "From the moment of the service of process the court has such control over the litigants that all its subsequent proceedings, however erroneous, are not void. If there is any irregularity in the process, or in the manner of its service, the defendant must take advantage of such irregularity by some motion or proceeding in the court where the action is pending. The fact that defendant is not given all the time allowed him by law to plead, or that he was served by some person incompetent to make a valid service, or any other fact connected with the service of process, on account of which a judgment by default would be reversed upon appeal, will not

ordinarily make the judgment vulnerable to a collateral attack." The text of this excellent treatise on the law of judgments is fully sustained by the authorities cited in the foot-notes.

In the case at bar, the judgment was simply erroneous, and would have been reversed on appeal. Therefore, the defendants might well release the errors and waive the irregularity in said judgment, and having done so, as alleged in the second paragraph of appellee's answer, those errors or irregularities were thereby cured, and could not be made available to appellant in this action.

Judgment affirmed.

NOTE.—For an interesting discussion of the question passed upon in this case, see 6 Cent. L. J. 301.

RAILWAY AID BONDS.

STATE *EX REL.* WILSON v. GARROUTTE.

Supreme Court of Missouri, April Term, 1878.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON, " WARWICK HOUGH, " E. H. NORTON, " JOHN W. HENRY, } Associate Justices.

1. THE COUNTY COURT OF GREENE COUNTY, without a vote of the people, by order of June 20, 1870, subscribed $400,000 to the capital stock of Kansas City & Memphis Railroad Company. Order modified October 4, 1870, so as to make subscription to Hannibal & St. Joseph Railroad Company, to aid in building the K. C. & M. R, R. April, 1871, order made rescinding former orders, and in July, 1871, order rescinding the rescinding order of April, 1871, and bonds issued, payable to H. & St. Joe R. R. Co. as bearers: *Held*, that as there was no acceptance by the latter company of the subscription, there was neither a contract nor a consideration for one, and that it was incompetent for the K. C. & M. R. R. Co., to accept the subscription.

2. THE AMENDATORY ACT of March 23, 1861 (Sess. Acts 1860 and '61, p. 60, § 2), providing that "it shall not be lawful for the county court of any county to subscribe to the capital stock of any railroad company, unless the same be voted for by a majority of the resident voters, who shall vote on such election held under the provisions of this act," prohibited such subscription after its passage, without such vote, to any railroad company, whether it had a pre-existing charter authorizing a subscription by counties or not. City of St. Louis *et al.* v. Alexander, 23 Mo. 483, strongly criticised and condemned.—Per SHERWOOD, C. J.

3. THERE IS NO VESTED RIGHT in a railroad company to a subscription until it be actually made, and until that event occurs the legislature may alter the method whereby such subscription is to be made, without infringing any right.

4. THE REPEAL OF THE ACT of March 23, 1861, by General Statutes of 1865 (R. C., p. 882), did not revive the right to receive such subscription, contained in charters of railroad companies, repealed by former act. Neither could such subscription be made without a vote of the people, after passage of General Corporation Act of 1865 (1 W. S., p. 305), in accordance with provisions of sec. 17 of that act; and as the attempted subscription in case at bar was made after passage of this act, and without such vote, it was void, under sec. 14, art. 11, of Constitution of 1865.—Per SHERWOOD, C. J.

5. THE CONSOLIDATION OF the Kansas City & Cameron Railroad Co., formerly Kansas City, Galveston & Lake Superior R. R. Co., under act of March 11, 1867, "upon such terms as may be deemed just and proper," with H. & St. Joe R. R. Co. did not operate to transfer to the latter company the franchises and unexecuted rights of former companies, so as to authorize a subscription to be made to H. & St. Joe R. R. Co., without a vote of the people, and such subscription is void. The effect of consolidation under that act was to work the extinction of the original company, in whose favor the subscription was authorized to be made, and the power to subscribe to the original company perished with the company to which it was attached.

6. THE K. C. & M. R, R. C., though nominally a branch of the H. & St. Joe R. R. Co., is, in fact, an independent company, attempted to be organized under act of March 21, 1868 (Sess. Acts 1868, pp. 90 and 91); and neither under that act, nor under any legislative authority existing when it was organized, could any subscription be made, by any county, to its stock or for its benefit, without a two-thirds vote of the qualified voters of such county.

7. WHERE THERE IS A TOTAL WANT OF POWER in a municipal organization to make subscription to capital stock of a railroad company, bonds issued in aid of the same are void, even in the hands of innocent purchasers.

APPEAL from Greene Circuit Court:

SHERWOOD, C. J., delivered the opinion of the court:

This suit is one of many, to recover railroad taxes for the years 1875 and 1876, and directly involves the validity of bonds issued in the name of Greene County to the Hannibal and St. Jo. R. R. Co., to aid in building the Kansas City and Memphis R. R., alleged to be a branch of the former road. To sustain the judgment for the amount of those taxes, reliance is, for the most part, placed on State *ex rel.* v. Greene County Court, 54 Mo. 540. That case was, however, decided by a divided court, Mr. Justice Vories delivering a very able dissenting opinion, one, the perusal of which, will at least give rise to grave doubts as to the correctness of the conclusions reached by the majority of the judges.

In addition to that, admissions were made by the demurrer to the answer in that cause, and on which the decision therein was chiefly based, admissions which find no support in the facts developed on the trial of the present cause.

The records of the County Court of Greene County show that an order was first made June 20th, 1870, subscribing $400,000 to the capital stock of the K. C. & M. R. R. Co., upon certain conditions; among them, that there should be a written acceptance by that company of the subscription. This order was modified October 4th, 1870, so as to make the subscription to the H. & St. Jo. R. R. Co., to aid in constructing the K. C. & M. R. R. upon similar conditions as before stated. In April, 1871, an order was made rescinding former orders, and the blank bonds were burned. In July, 1871, an order was made rescinding the rescinding order, made the previous April, and again rescinding also all that portion of the order of October 4, 1870, except certain portions not necessary to be men-

tioned, providing for the issuance of bonds on certain conditions to the H. & St. Jo. R. R. Co. These bonds were in the following form:

"UNITED STATES OF AMERICA.

COUNTY OF GREENE, STATE OF MISSOURI, No. —— } $1,000.

GREENE COUNTY BOND.

TWENTY YEARS.

"Know all men by these presents, that the county of Greene acknowledges itself indebted and bound unto the Hannibal and St. Joseph Railroad Company or bearer in the sum of one thousand dollars, which sum the county of Greene hereby promises to pay to said company or bearer, at the National Park Bank in the city of New York, twenty years after the date of these presents, together with interest thereon from the date hereof, at the rate of eight per cent per annum, which interest shall be paid semi-annually, on the presentation and delivery at said bank of the coupons hereto severally subjoined, until the payment in full of said principal sum.

"This bond being issued under, and pursuant to an order of the County Court of Greene County, State of Missouri, and in accordance with an act of the Legislature of the State of Missouri, entitled 'An act to incorporate the Kansas City, Galveston and Lake Superior Railroad Company,' approved February 9th, 1857, and 'An act to amend an act entitled an act to incorporate the Kansas City, Galveston and Lake Superior Railroad Company,' approved February 9th, 1857, and for other purposes, approved February 13th, 1864. And also an act entitled 'An act to aid in building of branch railroads in the State of Missouri,' approved March 21st, 1868.

"In witness whereof the said County Court of Greene County have caused these presents to be signed by the justices, and attested by the county clerk, with the seal of said county affixed, and the coupons hereto attached to be signed by the treasurer of said county.

"Done at the city of Springfield, this first day of August, A. D. 1871.

(Signed) R. P. MATHEWS, RALPH WALKER, } Justices.

[Seal of court.]

Attest: A. DEMUTH, Clerk of County Court."

Also a coupon, as follows:

"SPRINGFIELD, GREENE COUNTY, MISSOURI, August 1st, 1871.

"The County of Greene, State of Missouri, acknowledges to owe the sum of forty dollars, payable to bearer on the 1st day of August 1891, being the interest due on bond No. 136, for 1,000 dollars. This coupon payable at the National Park Bank, in the city of New York, State of New York.

(Signed) JARED E. SMITH, Treasurer of Greene County."

And were to be delivered from time to time to the treasurer of the *Kansas City and Memphis R. R. Co.*, and acceptance in writing on the part of *that company* was required and given.

Treating these various modifications and rescissions as valid, there was, as shown by the record, no acceptance by the H. & St. J. R. R. Co. of this subscription.

The first rescinding order shows, in unequivocal terms, a refusal on the part of that company to accept the subscription, and no subsequent acceptance is shown, nor that such company ever received any of the bonds made payable to its order, nor that such bonds were ever intended to be delivered to that company, nor that such company ever issued any stock to Greene county for the bonds which were issued.

Until both a subscription and its acceptance occur, there is no contract. Nugent v. The Supervisors, 19 Wall, 241; Aspinwall v. Commrs. of Daviess Co. 22 How. 379.

Under a valid subscription made, the county is entitled, as a matter of right, to a corresponding amount of stock of the company to which the subscription is made. Until the occurrence of subscription and its acceptance, as well as a corresponding delivery or intended delivery of stock, there would exist neither a contract nor a consideration for one. 19 Wall. *supra*. Nor could that company be compelled by mandamus, as has been suggested, to deliver to Greene county certificates of stock, for the simple reason that no contract so to do has been made. And, clearly, it was as incompetent for the K. C. & M. R. R. Co. to accept the subscription made to the H. & St. J. R. R. Co. as for any other railroad company to do so.

I think it will scarcely meet with doubt or dispute, that the evident spirit and purpose of our legislation respecting subscriptions to aid in building railroads, were that such subscriptions should not occur but with the consent of the people of the particular locality. It would, indeed, be doing violence to the intention of the law-makers to suppose that they designed that such subscriptions should occur, even when made without the formality of a vote, unless the people of the particular locality were favorable to the enterprise. This spirit first found direct and practical expression in the general corporation act, (R. C. 1855, p. 427), section 30 providing "that it shall be lawful for the county court of any county to subscribe to the capital stock of any railroad company, duly organized under *this or any other act*, in this state; and the county court * * * proposing to subscribe to such capital stock may, for information, cause an election to be held, to ascertain the sense of the tax-payers of such county * * * as to such subscription."

The word "may," in this section, was subsequently held to mean "shall." L. & D. M. R. R. Co. v. Platte Co., 42 Mo. 171. Judge Holmes remarking: "It is a power given to public officers, and concerns the public interest and the rights of third persons who have a claim *de jure*, that the power shall be exercised in this manner for the sake of justice and the public good. This construction is confirmed by the act passed at the same session, amendatory of this 30th section, and making the act read 'shall' instead of 'may.' * * * It follows that the subscription, as made, was without authority of law and void. * * * In

the positive requirement that the sense of the taxpayers should be first taken, it is necessarily to be implied that the power was not to be exercised without their consent and authority."

The amended act to which Judge Holmes refers, was approved January 14, 1860, (Sess. Acts 1859 and '60, p. 88), and goes to show a feeling of growing distrust which the people of this state, even at that early day, felt towards those empowered by law to encumber their property with onerous liabilities, under the plausible disguise of taxation for the public benefit. And that distrust made itself more strikingly manifest in the enactment of a further amendment to section 30, above quoted, providing that subscriptions to the stock of any railroad company should be made, if a majority of the voters should so say at an election held for that purpose. Section 2 of the amendatory act uses this emphatic language: "*It shall not be lawful* for the county court of any county to subscribe to the capital stock of *any railroad company*, unless the same has been voted for by a majority of the resident voters, who shall vote at such election under the provisions of this act." Sess. Acts 1860 and '61, p. 60. This section, its merits, its legal efficacy, have never been discussed in this court, although first urged upon its attention in the Macon County case, 41 Mo. 453. It was, however, altogether ignored, receiving no consideration whatever. But section 17 of the General Railroad Corporation Law was examined, (1 W. S. 305), and held *inapplicable* on the ground, among others, that no *negative* words were used, showing a conflict with the enabling act; and that as section 17 was framed after the constitution was adopted, it was designed simply to effectuate the 14th section of the 11th article of that instrument. In Smith v. Clark, 54 Mo. 58, it was *assumed* that, in the Macon County case, the act of 1861 was discussed, and it was there said that though that act was not "particularly noticed in the opinion of the court," yet that the act of 1865, which passed before the subscription was made, was fully considered, which act was just as stringent as the act of 1861, so far as the necessity of a vote was concerned. It is obvious that the learned judge who delivered the opinion of the court in that case, failed to note that the act of 1861, unlike that of 1865, contains words of prohibition, as well as to note that, stress is laid on the lack of this feature in the latter act in the Macon County case. Nor in the Clark Co. case, did the learned judge observe that in the Macon Co. case the act of 1865 was held inapplicable, because passed after the adoption of the constitution of that year, and therefore was presumed as intended to effectuate that instrument; to operate in the future, and not in the past. Obviously, the act of 1861 could only operate on the *future*, on the subscriptions made after its passage; and if it could not operate in that way, it was simply a legislative abortion.

Our law respecting the construction of statutes requires that they be taken in their "*plain, or ordinary and usual sense.*" Applying this rule, there is no room left to doubt but that the legislature intended by the act of 1861 to prohibit, and *did* prohibit the county court of any county, unless permitted by a vote of the people, to subscribe to the capital stock of "*any railroad company*," whether it had a pre-existing charter or not. More than that, the act in question makes it a *misdemeanor* to violate its provisions; for, if the judges of a county court should subscribe without complying with the statutory regulation, they would be clearly guilty of official misconduct amounting to a misdemeanor. 1 Russell on Crimes, p. 45, and cases cited; 1 W. S., pp. 487 and 488, §§ 17, 21 and 23. If a misdemeanor, then punishable by indictment. This being the case, it would seem impossible, in the very nature of things, to impute *civil validity* to an act which, at the same time, is punishable as a *crime;* to say, in a word, that the county judges could, without a vote, *lawfully* make a subscription for making which they could, also, be *lawfully* punished. Can it be possible that *civil ability* to perform an act, and *criminal liability* because of its performance, can simultaneously attach to one and the same act? This question furnishes its own answer.

As to the Alexander Case, 23 Mo. 483, approved both in the Macon County case, as well as the Clark County case, I have this to say: that it is far from being satisfactory; a *per curiam* opinion, and that it would not be easy to find its parallel in judicial annals. In that case, the charter of St. Louis, of the year 1843, declared that: "The city shall not at any time become a subscriber for any stock in any corporation." By a special act, approved March 1, 1851, permission was given the city to subscribe to the stock of a certain railroad company. By an act, approved March 3, 1851, reducing all laws relating to the incorporation of St. Louis "into one act, and to amend the same," it was declared that: "The city shall not at any time become a subscriber for any stock in any corporation," and that "*all acts and parts of acts contrary to and inconsistent with the provisions of this act, or within the purview thereof*, &c., *are hereby repealed.*" And yet it was held that the last-named act, with all its sweeping provisions and declarations, *did not* repeal that of March 1, 1851! I will take occasion in another place, to observe further upon the Alexander case.

But, even acknowledging that case as authority, it does not, perhaps, conflict with the views here announced, because, there, no *criminal responsibility*, as under the act of 1861, attached to making the subscription.

Penalty of itself implies prohibition, and this, though *no prohibitory words* are used in the statute. Bartlett v. Viner, Skin. 322. s. c. Carthew, 351; Langston v. Hughes, 1 M. & W. 596.

In Springfield Bank v. Merrick, 14 Mass. 322, it was said: "By the statute of 1809, c. 38, it was made *unlawful* for any bank to loan, negotiate, receive in payment, or otherwise deal in the bank bills of other states. * * * The note sued on in this action was made and received during the existence of this law, and in direct violation of its provisions. Can it then be recovered? If it can, *the judiciary power may, to a very great extent, defeat the manifest intent of the legislature.*"

And this way are all the authorities: Wall v. Williams, 60 Mo. 318; Sedgwick Constr. Stat. &

Const. Law, 71, and cases cited. Griffith v. Wills, 3 Denio, 326. and cases cited,

If it be said that the construction here insisted on will destroy vested rights under charters, the reply, sustained by authority, is that until a subscription be actually made, there is no *vested* right. St. Joe. & Denver City R. R. Co. v. Buchanan County Court, 39 Mo. 485; Aspinwall v. Commrs. of County of Daviess, 22 How. 364. Conceding, however, that the privilege of having a subscription made without a vote, is a vested right, even before its exercise by the county court, still the prohibitory law of 1861 does not impinge such right, and for this reason: The right to a subscription is one thing; the right to the *method* whereby that subscription *is made*, is another and totally different thing, since the legislature may well alter the *method* without infringing the *right*.

Thus, it has been held that, though a statute provided a *particular* method whereby taxes were to be assessed upon the property of the H. & St. Joe. R. R. Co., yet that a *general law*, applicable alike to *all* railroads, accomplished the repeal of the assessment provisions of the special law above noted, although no *repealing* words were used. This court remarking: "In the mode pointed out for the assessment and collection of the taxes on defendant's property, there are none of the characteristics of a contract. It is a simple regulation by which the result may be ascertained and arrived at; but there is nothing to inhibit the adoption or substitution of any other, if it should be deemed advisable or advantageous. The rights of the company are in no wise interfered with. The actual valuation of the property is the primary object sought to be attained, and the only question is, how that shall be most surely accomplished. * * * The State having adopted in part a different method from that contained in the act of 1852, and this being in some respects wholly inconsistent with that act, the latter mode, so far as the inconsistency goes, must prevail." State v. H. & St. Joe. R. R. Co., 60 Mo. 143. It is specially noteworthy in that case that the principle asserted in the Alexander case, was urged upon this court, but that it was passed in silence. Now, unless it can be shown that a *general* mode of assessment is more inconsistent with a *special* mode of assessment, than a *general* prohibition is inconsistent with a *special* permission, the Alexander case must be held as overruled, at least in principle, and substantially repudiated by the Hannibal & St. Joe. R. R. Co. case.

But if we take it that the mere method of subscription is a vested right, or that the act of 1861 does not accomplish what we have asserted; does not repeal inconsistent special provisions in charters; does not invalidate and render void acts violative of its provisions, then this is the result:

That the legislature, by the act of February 16, 1872, (Sess. Acts, 1872, p. 19), whereby they made it a *felony* for the judges of a county court to subscribe to the stock of "*any railroad company*," unless authorized so to do by two-thirds of the qualified voters, accomplished nothing; because, forsooth under the ruling in the Alexander case, a *general prohibition* against subscription, may well comport with a *special permission* to subscribe! Nay, more; if the mere *method* of subscription is a vested right, and as vested rights can not be interfered with any more by constitutions than by legislatures (Dodge v. Wolsey, 18 How. 331); and if the rule announced in the Alexander case is to continue to prevail, it of necessity follows that, even the framers of the present constitution, when fondly imagining that they, by Section 6, of Art. 9, p. 27, had put an absolute interdict upon future railroad subscriptions, sadly missed their mark, and fell far short of their design. Because, first: Vested rights are sacred; because, second: the same canons of construction apply equally to constitutions and statutes (41 Mo. *supra*) and "*there is nothing irreconcilable between a general prohibition (even in a constitution) to subscribe for stock in a corporation, and a permission (in a charter) to subscribe for stock in a particular corporation.*"

It would seem that a court might well hesitate before following the Alexander case to the above, its only logical sequence; thus hoisting anew the flood-gates of that series of frauds and felonies (for such has largely been the history of railroad subscriptions in this state) which has saddled whole communities with burdens too grievous to be borne, and encumbered with an ever-increasing debt every acre in the fairest portions of this great commonwealth. If it be said that the act of 1861 was repealed by virtue of the provisions of the General Statutes of 1865 (Gen. Stat. p. 882), then, while somewhat doubting that this has occurred, I reply: If such repeal did occur; if I am right as to the effect of the act of 1861 upon *all* railroad charters, in respect to the *method* of subscription, then the provisions of that act abrogated all conflicting provisions in such charters, and when the general statutes went into effect, they, according to their terms, repealed all laws re-enacted, in whole or in part, in the general statutes; but such repeal did not revive any law theretofore repealed or superseded; consequently, if the law of 1861 was repealed or superseded by the 17th section of the general corporation acts (1 W. S. 305) which was passed after the constitution of that year, and was designed, as has been expressly decided, to effectuate the 14th section of the 11th article of that instrument (41 Mo. *supra*), then, as no vote was taken in accordance with the provisions of the 17th section aforesaid, the attempted subscription in the case at bar, was, both according to the constitution of 1865, and the law passed pursuant to its requirements, void on that ground alone, regardless of other considerations hereinafter set forth. So that, it matters little, whether the act of 1861 was repealed by the general statutes of 1865 or not; in either event, a vote first taken was an indispensable pre-requisite to a valid subscription.

We are thus brought to consider the effect of the act of March 11, 1867, as well as that of March 21, 1868.

In the Greene County case, *supra*, it is to be observed that the demurrer to answer admitted that the K. C. G. & L. S. Co. had under the act of 1864

changed its name to that of the K. C. & C. R. R. Co.; that under the act of 1867 that company had consolidated with the H. & St. Jo. R. R. Co., by virtue of which consolidation, *the latter company had become the owners and possessed of all the rights, properties, privileges, immunities and franchises which the said K. C. G. & L. S. R. R. Co. had and possessed by virtue of its charter and acts amendatory thereto, or which the K. C. & C. R. R. Co. had by virtue of the charter of the K. C. G. & L. S. R. R. Co., etc., etc.*

There were no such admissions made in the present instance. Nor did the evidence show any such consolidation. Mere resolutions to consolidate, and mere statements in such resolutions to that effect, are but statements of legal conclusions. Facts should have been shown, in order that the court could have determined whether in truth such consolidation had occurred, and whether a transfer of the property of the K. C. & C. R. R. Co. to the H. & St. Jo. R. R. Co. had in reality taken place. But granting that a consolidation between the two companies did occur in accordance with the act of 1867, what was the effect of such consolidation? The language of the act is: "To consolidate it (the company) with any other company, on such terms as may be deemed just ahd proper,"

The original charter of the K. C. G. &. L. S. R R. Co. contained no provisions looking to consolidation. Now, what was the effect of the act of 1867, and of the alleged consolidation in conformity thereto? Did it transfer to, and vest in, the Han. & St. Jo. R. R. Co. the franchises, the corporate and unexecuted rights of the K. C. & C. R. R. Co.

It is well settled law that the privilege a railroad company may have of receiving a subscription to its stock, is not a vested right, and does not become so until subscription is actually made; and may be repealed at any time before that event occurs. 1 Dillon Municip. Corp. § 42; 22 How. *supra*; County of Dallas v. McKenzie, 94 U. S., 660; U. P. R. R. Co. v. Davis Co., 6 Kan. 256. The act in question does not even impliedly give authority to the K. C. & C. R. R. Co. to transfer its franchises, and unexecuted powers to the company with which it might, in the future, consolidate, nor does it provide upon what specific terms the consolidation shall occur, or what shall pass or be transferred thereby. Without legislative authority one company could not consolidate with another, and as legislature sanction must be given to a consolidation, (Clearwater v. Meredith, 1 Wall. 25,) so, also, must it prescribe the terms under which, and through which, such union must occur; and nothing passes from one company to another, by the action of the legislature, but what is expressly permitted or authorized thus to pass. P. & W. R. R. Co. v. Maryland, 10 How. 376. Upon the occurrence of consolidation by reason of legislative permission, the two companies become united and form an entirely new and distinct company. McMahon v. Morrison, 16 Ind. 172.

In Harshman v. Bates Co., 92 U. S. 569, 3 Cent. L. J. 367, where the law of this state authorizing consolidation, declared, in express terms, that the new company should be entitled "*to all the powers, rights, privileges and immunities which belong to either,*" and it was contended that this statutory provision justified the county court in making the subscription to the new company without further authority from the people. This assumption was not countenanced, the court saying: "But did not the authority cease by the extinction of the company voted for. * * * * So long as it remains unexecuted, the occurrence of any event which creates a revocation in law, will extinguish the power. The extinction of the company in whose favor the subscription was authorized worked such a revocation. The law authorizing the consolidation of railroad companies does not change the law of attorney and constituent. It may transfer the vested rights of one railroad company to another, upon a consolidation being effected, but it does not continue in existence powers to subscribe for stock given by one company to another, which by the general law are extinguished by such a change."

If, as held by the above quoted authorities, the power to have a subscription made without a vote to that effect first taken was never executed by subscription actually made, but remained an unexecuted power, and did not pass to the Hannibal & St. Jo. R. R. Co. by reason of the alleged consolidation, then it conclusively follows that the subscription was wholly without authority of law, and therefore void. The Greene County case differs from this, in the very essential particular that the demurrer to the answer as above seen, confessed that a consolidation had occurred, and that by reason thereof, all the rights, property, privileges, immunities and franchises formerly possessed by the K. C. G. & L. S. R. R. Co. had passed to, and become vested in the H. & St. Jo R. R. Co., and the remarks of the court were based upon that theory, and are, therefore inapplicable here, where no such admissions are made. And the authorities cited in that case clearly show such inapplicabilily. The case of the P. & W. R. R. Co. v. Maryland. 10 How 376, was one respecting exemption from taxation, where, in consequence of legislative action, the company in which the other company was merged, became possessed of the powers, rights, and privileges the several companies had, prior to consolidation, been possessed of. So, also, the case of Tomlinson v. Branch, 15 Wall. 460, was one merely respecting exemption from taxation, where by the very terms of the legislative permission, one company became merged in the surviving company, which became invested with all the rights, privileges and property belonging to the company whose identity was lost because of the consolidation. And the court were there of unanimous opinion, and speaking through Mr. Justice Bradley, who afterwards delivered the opinion in the Bates Co. case, *supra*, said: "The keeping alive of rights and privileges of the old company, and transferring them to the new company in connection with the property, indicates that the legislative intent was that such property was to be holden in the same manner and subject to the same rights as before. The owners of the property were to lose no rights by the transfer, nor was the public

to lose any rights thereby." But Mr. Justice Bradley was careful to say: "*Of course these remarks do not apply to those corporate rights and franchises of the old company, which appertain to its existence and functions as a corporation. These became merged and extinct.*" These remarks which I have italicized, seem to have escaped the attention of the learned judge who delivered the majority opinion in the Greene County case, or else were deemed of no importance in consequence of the admitted allegations of the answer.

Chartered exemption from taxation has always been deemed a vested right, incapable of revocation or abrogation by the legislature, or by consolidation in consequence of legislative action or authorization. Not so, however, as above seen, in respect to those rights and powers which are not vested, and do not become so in consequence of remaining unexecuted. In the Clark Co. case, 54 Mo. 58, and the Sullivan Co. case, 51 Mo. 523, no question of consolidation arose, and consequently they cannot be urged in support of the Greene County case, even should it be thought to antagonize this one on the point of consolidation.

Again, a branch road necessarily presupposes a main trunk line. It is a simple solecism to make any other supposition. It would be just as reasonable to suppose a branch without a tree, an agent without a principal, or a child without a sire. No pretence is made that the main line has ever been built. The K. C. & M. R. R. Co. either had its origin in the act of 1868 or it had not. If not, then what color of validity can corporate acts have which rest upon no legislative authority?

If, on the contrary, that organization is based upon that act, then no refuge is left from the inevitable result that the inhibition of the constitution of 1865, requiring a two-thirds vote to be taken before subscription, applies. The majority opinion in the Greene County case, admits that the K. C. & M. R. R. Co., "for all practical purposes is really a distinct and independent branch. The union exists simply *in name* but not *in substance.*" This statement is fully borne out by the record here. What is called a branch road, is, under the very terms of the act of 1868, totally distinct from the H. & St. Jo. R. R. Co., with separate stock and stockholders president, directors and liabilities. This being so, this question at once seeks an answer: Can the mandates of the constitution of 1865, be thus flimsily evaded by merely calling what is in evident truth and fact an independent road, "*a branch?*" If so, then in the expressive language of Mr. Justice Norton in the LaFayette Co. case, "*Constitutional provisions accomplish nothing, and organic laws may be set at naught by the merest evasion*"' If then, the K. C. & M. R. R. is to be regarded as an independent organization, as having its origin in the act of 1868, and of this a perusal of that act and of the facts disclosed by this record, will convince any one, then under the authority of the Saline County case, 51 Mo. 351, and of the Callaway County case, Id. 395, a vote, as required by the constitution, was an indispensible pre-requisite to a valid subscription. In Nugent v. Supervisors, 19 Wall. 241, the subscription had been made and accepted by the company, anterior to the occurrence of consolidation of that company with another; and that case is distinguished on that express ground, from that of Marsh v. Fulton Co., 10 Wall, 676, where, in 1853, the Mississippi R. R. Co. was incorporated by the legislature of Illinois, and authorized to construct a railroad from Warsaw, on the Mississippi river, to the east line of the state. A vote of the people of Fulton Co. was then taken, authorizing a subscription to the stock of this company. After vote taken, but before subscription made, the legislature, in February, 1857, amended the charter of the company, divided the road into three divisions, designated as the Western, Central and Eastern, and each division was authorized to elect a separate board of directors for the management of their own division, conformably to this action of the legislature. A subscription was then made to the central division; but it was held by the Supreme Court of the United States, that this was a totally different enterprise from the one authorized by the vote had, and that the bonds were void and valueless in whosesoever hands they came.

That case, which has twice been cordially indorsed by this court, in State v. Saline County Court, 48 Mo. 390, and Ranney v. Baeder, 50 Mo. 600, confessedly bears a striking resemblance to the present one. Here, a subscription was authorized to the K. C., G. & L. S. R. R. Co. That company afterwards by legislative authority changed its name to that of the K. C. & C. R. R. R. Co. After that an alleged consolidation occurred between the latter company and the H. & St. Joe R. R. Co. After that the subscription was made to the last named company, for the use of the K. C. & M. R. R. Co., the mere creature of the act of 1868. A more conspicuous parallelism could not well exist between two cases, because there can be no difference in point of principle between an authority to subscribe to a particular company, conferred under legislative sanction by a vote of the people and a like authority directly conferred by statutory enactment, as, in either instance, the effect and consequences attending a subsequent consolidation can not fail to be the same. We hold, therefore, that the rule of law which dominates the Fulton County case, must also dominate this one, and be conclusive against a recovery by the tax collector.

It is claimed, however, that a large number of the bonds issued have been transferred to "*innocent purchasers*," and, therefore, the bonds should be paid even unto the uttermost farthing, regardless of whatsoever means, measures and motives may have caused the market to be flooded with the unwarranted issue. But where there is a total lack of power to make the subscription, there can not be such a thing as an innocent purchaser. County of Dallas v. McKenzie, 94 U. S. 660; McClure v. Township of Oxford, id. 429; Marsh v. Fulton Co., 10 Wall. 676; Aspinwall v. Commrs. of County of Daviess, 22 Howard, 364.

But granting that there may be, is it not barely possible that the tax-payer who is called on to pay these unauthorized bonds has some rights

which the courts should feel bound to respect? Is the judicial eye to bestow no glance in the direction of the *defendant* to the action? *His* property at least, has been acquired in no questionable manner, and certainly his equities to have that property protected against unlawful assessments and seizures are evidently equal to the equities of him who has bought these bonds with the law and the constitution staring him in the face; who, reaching out with insatiate arms to grasp in all the shore, has "taken the chances," and taking them, has made speculations without profit and ventures without gain. The judgment is reversed. Judges Henry and Norton concur in a separate opinion. Judges Napton and Hough dissent, both filing dissenting opinions.

NORTON and HENRY, J.J., concurring:

We concur, but express no opinion as to the effect of the act of 1861 on the question involved. We are fully satisfied by the other reasons given in the foregoing opinion that the county court of Greene County was not authorized to subscribe for the stock in question, and that the bonds issued in payment therefor are not binding on the county.

It is not the case of an irregular exercise of authority, but of an assumption of authority where none existed, and we think that the bonds are therefore utterly void, no matter in whose hands found.

HOUGH, J., dissenting.

On the 29th day of March, 1878, the plaintiff instituted suit in the Greene Circuit Court to recover back taxes, designated on the back tax book as railway taxes for the years 1875 and 1876, on land in Greene county, in the State of Missouri; to pay interest on certain bonds, heretofore issued in the name of said Greene county to the Hannibal & St. Joseph Railway Company, to aid in building the Kansas City & Memphis Railroad, as a branch of said Hannibal & St. Joseph Railroad. On the 20th day of May, 1878, final judgment was rendered in favor of the plaintiff, from which judgment the defendant has appealed to this court. It is agreed between the parties to this suit "that the only question at issue, or sought to be raised in this case or submitted to the court for adjudication, is the validity of the bonds issued by and in the name of Greene county, to pay a subscription of stock in the Hannibal & St. Joseph Railroad Company, to aid the building of the Kansas City & Memphis Railroad, which bonds *were issued and sold, and the proceeds expended in the work of grading and masonry on said road.*" This identical question was considered and decided in the case of State, at the relation of the Attorney General, v. Greene County and Greene County Court, 54 Mo. 540, which was a proceeding to restrain by injunction the collection of a tax levied, and the further levy of any tax in Greene county for the purpose of paying either principal or interest on the bonds aforesaid, and said bonds were in said suit declared by this court to be valid, on facts stated in an answer filed by Greene county. The object of the present appeal is to review that decision.

That decision furnished a rule of property as to those bonds, which is binding upon Greene County and its citizens. Moreover, that decision was rendered at the January Term, 1874, of this court, and the ruling there made as to the effect of the consolidation of the K. C. & C. R. R. Co. and the H. & St. Joe. R. R. Co., was two years afterwards cited with approval in the case of Daniels v. St. Louis, K. C. & N. R. R. Co., 62 Mo. 43, the opinion in which latter case was concurred in by all the members of this court, except Judge Vories, who was absent. Credit and currency having been thus given by this court nearly five years ago to these bonds, whatever might be my opinion, if the question were an original one, I can not now join in declaring these bonds invalid, especially in a case to which the holders of the bonds are not parties. State *ex rel.* v. Sanderson, Collector, 54 Mo. 203. If any persons have purchased these bonds on the faith of the decisions of this court declaring them to be valid, they are as much entitled to protection as they would be if the right of the county court to issue the bonds had been affirmed by this court before the bonds were issued. Smith v. County of Clark, 54 Mo. 75; Gelpke v. City of Dubuque, 1 Wall. 175; Thompson v. Lee County, 3 Wall. 327; Havermeyer v. Iowa County, Ib. 294; State of Missouri v. Miller, 50 Mo. 133.

For these reasons, I am in favor of affirming the judgment of the circuit court.

NAPTON, J., dissenting:

I dissent from the above opinion. I adhere to the decision of this court pronounced by Judge Wagner in 1874, 54 Mo. 540, and subsequently, in 1876, reiterated in Daniels v. St. L., K. C. & N. R. W. Co., 62 Mo. 48, which had the concurrence of all the judges, except Judge Vories, who dissented from the original opinion. But whether the original opinion in this case was right or wrong, since on the faith of it money was invested, I am opposed to disturbing it. I, therefore, dissent *in toto* from the above opinion.

NOTE.—For the first time in the history of Missouri adjudications has the act of 1861 received judicial attention, and its provisions been fairly examined in the light of established rules of interpretation. The only other case in which any mention whatever of the act, or its existence, is made, is Smith v. Clark County, referred to by Judge Sherwood in the principal case. Here, Judge Napton, in summing up, says of this act: "Whatever, therefore, might be the opinion of this court, or of any individual judge, had the question come up for examination as an open one, we are all of opinion that it is now too late to disturb the *received construction.*" One would naturally infer from this language that the act of 1861 had, through a long line of unbroken decisions, already "received construction," and that it was a matter of judicial regret that the question was no longer an open one. In examining the opinion of the court for this line of decisions, we find the following statement: "The question is whether these provisions in the general law (1861), on the subject of railroad corporations, repealed the specific provisions of the special acts chartering particular companies. In 1867, the Macon County case was decided, and *the subject was there discussed and decided.*" After referring to the Macon County case and its citations, reference is made to State v. Probate Court, 38 Mo. 529, and City of St. Louis v. Ind. Ins.

Co., 47 Mo. 146, concluding with this emphatic declaration: "So that the provisions of the Revised Code of 1855 and the amendatory acts of 1860 and 1861, * * * * have been held by repeated adjudications * * * not to effect the repeal of the privilege contained in special charters." The court does not itself decide that the act of 1861 ought not, or does not, repeal the so-called privilege, but carefully places the responsibility of such a result upon those "repeated adjudications," and adhering with almost reluctance to the rule of *stare decisis*, yields to what they say was decided in the Macon County case. But in none of the opinions in the cases cited is this act of the legislature mentioned, or in any way alluded to; it must be then that, in the view of the court, some inexorable rule of construction was there declared, which applied with equal force to the provisions of this act. Now, what was that rule? Was it as the court assumes, or was not the character of language used in this statute expressly excepted and saved from its operation? Judge Wagner delivered the opinion in the Macon County case. He was there considering two affirmative statutes, both enabling acts, the first of which in the special charter of the railroad company, provided "it shall be lawful for the county court of any county to subscribe;" and the second, a general law provided that "it shall be lawful for the county court of any county to take stock; *provided*, two-thirds of the qualified voters of the county assent thereto." The second and later act was just like the former, except to it is added the proviso requiring a vote. In discussing the effect of the later general act, Judge Wagner lays down a rule which is supposed to be applied in the Clark County case, one which has ever since been cited with approval and followed by that court. "A later statute which is general and *affirmative* does not abrogate a former which is particular, *unless negative words are used*, or, unless, the two acts are irreconcilably inconsistent." So that if negative words are used, or if without such words the two acts are irreconcilably inconsistent, a later general statute does abrogate a former which is particular. A sense of the imperative distinction between the use of affirmative and negative words is impressed on every page of his opinion, saying again: "Besides the 17th section of the general railroad law, with which the enabling act is supposed to conflict, *uses no negative words.*" Again, in the same opinion, in commenting on Vastine v. Judge of the Probate Court, 38 Mo. 529: "But we decided that *as negative words were not used*, there was not such an inconsistency as would produce a repeal by implication, and prevent both laws from standing together." In the subsequent case of City of St. Louis v. Ins. Co., 47 Mo. 146, cited by Judge Napton as a precedent for his decision, the court again repeat the language just quoted from the Macon County case, and, concluding, say, "this is the general doctrine, and it has been often adjudged in this court."

It appears then that, at the time the court were writing the opinion in the Clark County case, the unquestioned and oft-repeated rule in this state was that, when negative words were used in the later general statute, they did, by implication, repeal a former special act. The court were then considering two inconsistent statutes. The first, affirmative and special, the second, negative and prohibitory, but general; by the former "*it shall be lawful* for the county court, of any county, * * * to subscribe;" by the latter "*it shall not be lawful* for the county court of any county to subscribe," unless with the assent of a majority of the resident voters.

The exercise of the power permitted by the first, is by the second statute made unlawful, the two are manifestly repugnant—irreconcilably so—and the negative words used in the latter, distinguish it from the statute considered in the Macon County decision, and bring it within the letter and the spirit of the exception, which is a part of the rule there laid down. To the profession, who are deeply interested in the final and fair solution of the intricate questions involved in the bond litigation, it is of the highest importance that before a case becomes a precedent it should be clear that it is not the result of misapprehension. "Precedents should be light-houses to a port of safety."

While it may be true, when courts decide a question, that decision becomes an element in the protection of property rights; yet, when courts declare that, in some other case, they have made a decision, which they never made, such declaration ought not to be held equivalent to a decision of the yet undecided question, and fairly subjects the court to the criticism, respectfully made, of having ignored or overlooked the terms of a statute they were required to enforce.

The legislative history of this act of 1861, will throw much light upon its purpose. At that time every railroad in operation, or projected and surveyed, in the state of Missouri, was brought into existence by a special charter. It then became the avowed policy of the general assembly to impose a restraint upon the unlimited powers to subscribe contained in charters, and to protect the people where they most needed protection. To attribute to that body a design of saving from the operation of this act the only class of corporations which could invade its declared policy, would empty the act of all meaning, leaving it upon the statute book meaningless and useless. And so careful was this legislature, and so exact in expressing their meaning, that they used language which, from the days of the common-law to this day, has been adjudged to be a competent and convenient method of repeal. And, as though apprehensive that the emphatic language used in the second section might be overlooked, they went further and stamped the unlawful act as *a crime*. If, we ask, it is ever possible for a general law, by reason of repugnancy, to abrogate or limit the effect of a special law, and if it was the intention of this legislature to accomplish this result, what other and more explicit language could have been employed? Can it be that the general assembly enabled counties to subscribe without a vote under a charter, while the same subscription, if made under the general law, was denounced as a crime? In the language of Holt, C. J., in Bartlet v. Viner, Skinner Rep. 322: "Therefore, in every case where a statute inflicts a penalty for doing an act, though the act be not prohibited, yet the thing is unlawful, for it can not be intended that a statute would inflict a penalty for a lawful act."

The doctrine of the Alexander case, 23 Mo. 483, that a general prohibition against subscriptions may well comport with a special indulgence to subscribe, stands alone in the decisions of this state in its application to repeals by implication—often cited, never followed. In its entire application it has been overruled by State v. H. & St. Joe R. R. Co., 60 Mo. 143. In considering that doctrine it may properly be assumed—1st, that there are repeals by implication; 2d, that under certain circumstances special acts may be modified or repealed by a subsequent general act. These distinguishing circumstances are—1st, irreconcilable inconsistency; or, 2d, the use of negative words in the later act; or, 3d, a penalty affixed to the commission of the act as originally permitted. Certainly the act of 1861 contains the two last, so that the indulgence is denied by negative words, and made unlawful and criminal by the penalty affixed. If this be no modification or repeal, then the old rule has been superseded in this state, and no special law can be repealed by implication. To the honor of Judge Sherwood, let it be said that he has rescued this act from judicial oblivion, and adjudged from the bench what the legislature first declared—that a subscription without a vote was unlawful and a crime.

It will perhaps be insisted by those who represent the broker and the bondholder, that although this question was not passed on when the Green county bonds were first examined by the Supreme Court, yet policy and expediency require that their validity should never again be subjected to other tests, or the operation of laws overlooked or ignored. This argument is sometimes urged in favor of a purchaser who has been misled; but far oftener it is the refuge of the bond gambler, who demands the sacrifice of every other interest to his own, and who looks upon courts rather as his accomplices in speculation than as tribunals appointed to administer equal and exact justice. Far beyond the question of expediency there is involved a great question of right and wrong, which will never be satisfactorily answered until courts declare that it is never expedient to do wrong.

It will not do to say that the re-examination of bonds upon new issues will tend to weaken the effect of decisions and disturb the influence of courts, because this is a right exercised by the judiciary upon all other questions, and in all other matters it is conceded without challenge; and besides, the Supreme Court of the United States has so thoroughly demonstrated the elasticity of the law on the bond question that it would be unbecoming in the profession to criticise the Supreme Court of Missouri. *Vide* Harshman v. Bates Co., 92 U. S. 569, 3 Cent. L. J. 367; *contra*, Cass Co. v. Johnson, 95 U. S. 360, 5 Cent. L. J. 506.

The diversity of opinion in our state court is no less marked than on the Federal bench, where such men as Justices Miller and Bradley have always on these questions dissented from the extreme views of the majority. Just where these extreme views, when enforced, may lead us, can not be contemplated without some misgiving. It has been a part of the education of every lawyer that to the sovereignty of the state was committed the exclusive power of exercising, regulating and limiting the right of state taxation. And yet, when the Missouri Legislature, before authorizing the issue of municipal bonds, provided as a protection for the tax-payer a limitation upon the amount of tax to be imposed for this purpose, (State v. Shortridge, 56 Mo. 126), a majority of the United States Supreme Court, refusing to follow this decision, proclaimed the right of the bond-holder to all the county revenues, irrespective of this limitation. United States *ex rel.* Johnson v. County Court of Clark Co., decided in January, 1878.

And peremptory writs of *mandamus* are constantly being issued by both the Federal Courts in this state commanding county officers, regardless of the requirements and necessities of the county itself, to pay the judgments on bonds out of any moneys in the treasury; and as these judgments are largely in excess of the amounts raised by special railroad tax, the counties are required to exhaust all other funds, leaving nothing for the current expenses—nothing for courts, grand juries, poor-houses, etc. When that court undertake, in behalf of a particular class of creditors, to take the entire revenue of a county for the payment of their dues, and hold that until the bondholder gets his pound of flesh no municipality in this state shall be permitted to use from their own treasury the necessary means to support courts of justice, pay its grand jury, care for its paupers, or punish its criminals, it amounts to a complete destruction of the means, and hence the right, of local government. It is but a step further to concede a jurisdiction to the Federal Courts of dispensing with those rights which have been reserved to the states; and to grant to them the exercise of powers which would be more tolerable under an absolute government.

The tendency of that decision may not now be so apparent; perhaps it is only a shadow. The danger is the shadow may materialize.

To a court that could undertake the promulgation of a doctrine with such results, the Missouri taxpayer may well exclaim with poor Cordelia:

"I love your majesty
According to my bond; nor more, nor less!"

J. P. E.

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

[Filed at Ottawa, June. 21, 1878.]

Hon. JOHN SCHOLFIELD, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" BENJAMIN R. SHELDON,
" PICKNEY H. WALKER.
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
} Associate Justices.

SCHOOL LAW—CERTIFICATE—STATUTE.—Action by appellee against appellant for services as a school teacher. Appellee was employed for a certain time at a certain monthly salary, and at the end of the month was discharged by two of the directors. It was argued that the certificate of the qualifications of appellee as a teacher, was not sufficient under the statute, which provides: "No teacher shall be authorized to teach a common school, * * * who does not possess a certificate as required by this section." It is made the duty of the county superintendant "to grant certificates to such persons as may, upon due examination, be found qualified, * * * and said certificate may be in the form following." Here follows a form. DICKEY, J., says: "The certificate produced complies fully with the statute in this respect. It is not invalid for want of conformity to the form furnished in the statute. The statute prescribes what fact the certificate must state, and then adds that the certificate may be drawn in a given form. The word "may," in this case, was not intended to be interpreted "must." Nor is it conceived that such certificate can be invalidated in this proceeding by proof that no personal examination of the teacher was had. The certificate is in the nature of a commission and can not be attacked collaterally." Affirmed.—*School District No. 6 v. Sterricker.*

PUBLIC ROAD—OBSTRUCTION—DEDICATION.—This was a prosecution under the statute for obstructing a public road by fencing. The land in question was vacant and unoccupied, the public traveling over it until February, 1876, when the appellant, who owned the adjoining property, began improving and fencing it. The public had been traveling over it unopposed for more than twenty years, but the travel was not confined to any particular track. Several efforts had been made to lay out a road, but failed. A plat and survey of the road had been made, but some time after appellant built the fence. BREESE, J., says: "We understand it to be conceded by appellee there is no record of any highway at this point established by the civil authorities, but they contend there was a public highway there either by dedication or by user for twenty years, or by prescription. * * * As to dedication, we think the testimony quite unsatisfactory. In order to justify a claim that title to a tract of land has been divested by dedication, the proof should be very satisfactory either of an actual intention to dedicate, or of such acts and declarations as should equitably estop the owner from denying such intention. Kelly v. City of Chicago, 48 Ill. 388. Our experience teaches that land has been used by the public, in different parts of the state, for the purposes of travel when it was vacant, and the owner having no

occasion to occupy it exclusively. It would be unjust to say that the public, by this acquiescence under such circumstances, acquired a title to part of the land. The owner of land must do some act or suffer some act to be done from which it can be fairly inferred he intended a dedication to the public." See also Warren v. President, 15 Ill. 236. Reversed and remanded.—*Kyle v. Town of Logan.*

INJUNCTION — JUDGMENT — NEGLIGENCE. — This was a bill in equity to enjoin and set aside a judgment rendered by default against appellant. The action in which the judgment was rendered was in trespass for damages done to certain docks. There is no dispute as to the fact of the trespass, and some consequent damage. The only question at issue is as to the question of fraud in obtaining the judgment, which, it is admitted, was excessive. The complainant here claims that the injustice of the judgment is so gross in the respect of the vast difference between the amount recovered and the amount of the rightful claim as to evince fraud or mistake in the obtaining of the judgment, and upon that ground of itself it should be relieved against. The complainant also attempted to show that the attorney of the plaintiff, in the suit at law, promised that he would do nothing further therein, and that, because of reliance thereon, appellant failed to make defense to the suit, and that he knew nothing of the judgment obtained until some time afterwards. SHELDON, J., says: "The principle governing in such cases is, that any fact which proves it to be against conscience to execute the judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will authorize a court of equity to interfere by injunction to restrain the adverse party from availing himself of such judgment." *Held*, that complainant was guilty of negligence, and hence could not obtain relief. Affirmed. Dickey, J., dissenting. —*Walker v. Shreve.*

ABSTRACT OF DECISIONS OF SUPREME COURT COMMISSION OF OHIO.

December Term, 1877.

[Filed June 19, 1878.]

HON. W. W. JOHNSON, Chief Justice.
" JOSIAH SCOTT, }
" D. T. WRIGHT, } Associate Justices.
" LUTHER DAY, }
" T. Q. ASHBURN, }

MISCONDUCT OF JURY — VERDICT — BILL OF EXCEPTIONS.—1. Where there has been irregularity or misconduct on the part of the jury, which might affect its judgment, or improperly influence the verdict, a new trial should be granted. Where, however, it clearly appears that no improper effect could arise from the alleged misconduct, the verdict should stand. 2. A separation of the jurors, after the jury has retired to the jury room to consider of the verdict, induced by a sudden alarm of fire in the near vicinity of the jury room, is not, of itself, such misconduct as will vitiate the verdict made on reassembling. 2. A juror separated from his fellows, and privately asked an attorney, in no way connected with the case or parties thereto, " how are we to get along without those books or papers," saying, "they have not let us have them," to which the attorney replied in substance, you must do the best you can; he could give him no advice; that the juror could send up and have the court advise them. *Held*, although such conduct on the part of the juror was a violation of his duty, yet, as it did not show any bias or prejudice for or against either party that would affect the verdict, it was not sufficient cause for a new trial. 4. Although a bill of exceptions states that it contains all the evidence offered on the trial, yet, if on examination it shows that material evidence or documents referred to are omitted, the reviewing court will not reverse the judgment on the ground that the verdict is against the evidence. Opinion by ASHBURN, J.—*Armleder v. Lieberman.*

WILLS — LIMITATION OVER — CONSTRUCTION.—In one clause of his will, a testator bequeathes to M L, a married woman, living with her husband, a specific sum of money. In a subsequent clause, it is provided that if M L shall die leaving no child of her own, then the money shall be equally divided between the testator's living children, the issue of his own body. Upon final settlement of the estate, the executor had funds sufficient to pay all the legacies, but refused to pay M L, claiming the right to hold the amount during her life, to be placed at interest for her benefit. Assuming that the limitation over to the living children of the testator, in the event that M L shall die leaving no child of her own, is valid, and not void as being inconsistent with the first clause: *Held*, 1. That as the bequest over is upon uncertain contingencies that may never happen, namely, the death of M L, leaving no child of her own, with living children of the testator surviving her, the children of the testator, if they take at all, do so by way of executory devise, and not as legatees in remainder. 2. M L takes the bequest absolutely and is entitled to the possession thereof. Her estate, if the limitation over is valid, is liable to be divested by the happening of the contingency named, and no estate or interest vests in the possible legatees over until such contingencies happen. 3. Upon final settlement of the estate before the death of M L, and in the absence of any provision of the will making it the duty of the executor to hold and manage said legacy, she is entitled to receive the same. 4. If such limitation over is valid, the children of the testator and not the executor, in the absence of a trust reposed in him, are the proper parties to an action or proceeding to protect their contingent interest, if any necessity for such action arises. Judgment reversed. Opinion by JOHNSON, C. J. Ashburn, J., not sitting.—*Lapham v. Martin.*

ABSTRACT OF DECISIONS OF THE SUPREME COURT OF IOWA.

June Term (*Des Moines*), 1878.

HON. JAMES H. ROTHROCK, Chief Justice.
" WM. H. SEEVERS, }
" JAMES G. DAY, } Associate Justices.
" JOSEPH M. BECK, }
" AUSTIN ADAMS, }

STATUTE OF LIMITATIONS. — A personal action which is barred by the statute of limitations of any state where the defendant has resided, can not be maintained in this state, even though the cause of action arose here. Opinion by ROTHROCK, C. J.—*Davis v. Harper.*

LOST NOTE — WHEN SPECIALLY INDORSED — INDEMNITY.—Where a lost note was indorsed: "Pay Cashier First National Bank, Ottumwa, Iowa, or order:" *Held*, that the maker had no right to demand indemnity upon payment, and that a tender conditional upon such indemnity did not stop the accruing of interest. Opinion by ROTHROCK, C. J.— *Dudman v. Earl.*

EVIDENCE—CONTRACT.—In an action to recover upon a building contract, the plaintiffs' alleged per-

formance of the contract in accordance with its terms. As a defense, certain alleged deviations by plaintiffs from the specifications in the contract were set up. *Held*, that evidence that such deviations were authorized or waived by defendants was inadmissible under the pleadings. Opinion by ROTHROCK, C. J.—*Fauble v. Davis.*

STATUTE OF LIMITATIONS — WHEN ACTION ACCRUES—CLERK OF COURT.—A right of action against the clerk of a court for accepting an insufficient stay bond accrues at the expiration of the stay, and not when the bond is taken. *Argument:* While the act upon which the liability arises is committed when the bond is taken, yet no right of action or claim exists against the surety accepted until the stay expires, and any damage to the judgment plaintiff is, until that time, contingent upon the failure of both principal and surety to then pay the judgment. Opinion by SEEVERS, J.—*Steele v. Bryant.*

CORPORATION — STOCKHOLDER — SUBSCRIBER TO STOCK.—Where a person signed a paper purporting to be a subscription to the stock of a railway company, and the paper was delivered to the company: *Held*, that it constituted an agreement between the parties, and the subscriber became thereby a stockholder in the absence of any provision of the company requiring payment as a condition of membership. Citing Chester Glass Co. v. Dewey, 16 Mass. 94: Spear v. Crawford, 14 Wend. 20; Vawter v. O. & M. R. R. Co., 14 Ind. 174. Opinion by ADAMS, J.—*Waukon & Mississippi R. R. Co. v. Dwyer.*

QUERIES AND ANSWERS.

[In response to many requests from lawyers in all parts of the country, we have decided to commence again the publication of questions of law sent to us by subscribers. We propose to make this essentially a subscriber's department—*i. e.*, we shall depend, to a large extent, upon them to edit this column. Queries will be numbered consecutively during the year, and correspondents are requested to bear this in mind when sending answers.]

QUERIES.

40. SALE— REFUSAL TO DELIVER — CONTRACT — RIGHT TO POSSESSION.—A's inkstand is on his table; B says, "I will give you a dollar for your inkstand." A says, "I accept, it it is yours;" whereupon B pays the money, the inkstand all the while remaining on the table, unmoved by either party during the negotiations. B steps out to his carriage to fetch his satchel to put the inkstand in. On his return, A refuses to let him take the inkstand. In whom is the legal title to the inkstand, and what action at common law independent of all statutes must B bring for redress? J. A. F.
Dover, Del.

41. KANSAS STATUTE PERMITTING ADJOURNMENT OF TRIAL—CONSTRUCTION.—Section 81, Ch. 81, Gen. Stats. 1868 (Kansas), provides as follows: "The trial may be adjourned upon the application of either party without the consent of the other, for a period not exceeding thirty days, as follows: The party asking the adjournment must, if required by his adversary, prove, by his oath or otherwise, that he can not, for want of material testimony which he has been unable to procure, safely proceed to trial." Is the bare statement that the party "can not, for want of material testimony which he has been unable to procure, safely proceed to trial," a sufficient showing for a continuance? B

42. INTER-STATE COMMERCE—LICENSE.—Since the case of Welton v. State of Missouri, 3 Cent. L. J. 116, it has been thought that the license question as to foreign (other states) commercial travelers was at rest. It seems that in New Orleans and other southern cities licenses are required of traveling agents of northern manufacturers of furniture, etc., who go from place to place and house to house and offer their manufactures for sale to dealers by photographic representations of their wares. Is there any new light on that subject? S.
Lawrenceburg, Ind.

43. CHANGE OF VENUE—FORECLOSURE—REQUISITES OF DECREE.— Under the statute of Indiana, which provides for changing the venue of causes, a suit to foreclose a mortgage, in the county where the land is situated, is sent to an adjoining county, and a decree finally rendered in said county foreclosing the mortgage. If this decree does not state that the court acquired jurisdiction over the subject matter by virtue of the change of venue to said court, is it a valid decree? And if a sheriff sells the mortgaged property on the decree so rendered, does the purchaser acquire any title to the property so purchased thereby? And can that decree, or the sheriff's deed under it, be collaterally attacked, when offered in evidence in a suit in ejectment, by the holder of the sheriff's deed against the defendants. H. J. E.
Indianapolis, Ind.

ANSWERS.

No. 36.
(6 Cent. L. J. 479.)

The sheriff can hold 4 years under the new constitution. The provision applies to periods of time under the new constitution, and not to terms of office. Carson v. McPhetridge, 15 Ind. 329. E. H. C. C.
Bloomfield, Ind.

The constitution of a state *eo instanti* it is superseded by a new one ceases to have any vitality for any purpose. From that moment the new one alone possesses power and vitality, and confers rights and imposes disabilities. If the new one contains no schedule making provision continuing or affecting any rights conferred or disabilities imposed by the old, then all such rights are lost, and all such disabilities are nullified at once, and *in toto*. And where such new constitution disqualifies the holding an office created by it by the same person for a longer period than it prescribes, such holding to work such disqualification must be exclusively under such new constitution.
Vincennes, Ind. C. & B.

BOOK NOTICES.

UNITED STATES DIGEST. A Digest of Decisions of the various courts within the United States. By BENJAMIN VAUGHAN ABBOTT. New Series. Vol. VIII. Annual Digest for 1877. Boston: Little, Brown, & Co. 1878.

When we say that this is the United States Digest for 1877, we have said everything that is necessary. The profession do not need to be reminded of its value; it has long ago become indispensible to the practicing lawyer, and its merits are too well known to require repeating here. The present volume comprises eighty-one volumes of state reports, and thirteen of federal

court reports. In its typographical appearance it is equal to that of the previous volumes.

Messrs. Honeyman & Co., of Somerville, N. J., have published, in pocket form, an abridgment of the Revised Statutes of New Jersey, and of the Amended Constitution. It contains 367 pages and is neatly bound in black cloth. The press work is excellent, and it can not fail to be popular with the profession of that State. —The third volume of Mr. Blickensderfer's Review of Legal Studies (Chicago, E. B. Myers) is just issued. In this handy edition, the student will find an excellent digest of the principles of criminal law and of equity. The book also contains a table—full enough for the purpose—of law terms and phrases, and a list of legal maxims. It is bound in flexible covers, and can be carried about in the pocket without inconvenience.

NOTES.

THE Governor of Illinois has appointed to the vacancy on the Supreme Bench caused by the death of Judge Breese, Judge D. J. Baker, of Cairo, at present one of the judges of the appellate court for the fourth district.

AMONG the questions just reported upon by the commission, appointed by the British government, to consider the question of Extradition is whether a state should surrender its own subjects to a foreign state. The chief arguments against such a surrender are that a man should not be withdrawn from his natural judges; that the state owes to its subjects the protection of its laws, and should not, by handing them over to a foreign jurisdiction, deprive them of the guarantees of their own laws; that entire confidence can not be placed in the justice of a foreign state with regard to strangers: that it is a great disadvantage to a man to be tried in a foreign language, and where he is separated from his friends and from those who could testify to his character. For these reasons, it is contended that powers hould be given to try a man in his own country for a crime committed in another. On the other hand, it is argued, say the commission, that if offenses, committed by British subjects abroad, are to be tried in England, it would entail a change in the principles of our criminal law, which has never, save in a few exceptional cases, undertaken to control, for the purposes of police, the actions of British subjects in foreign countries; and, further, if a fugitive criminal ought to be tried in his own country instead of in that where the offense has been committed, it follows that any foreigner who violated the laws of the state in which he resides shall also be sent to his own country for trial and punishment. A person commorant in a foreign country owes obedience to its laws in return for the protection which they afford him, and he should be in no different position if he has fled without, than if he had remained within the jurisdiction of the laws he has violated. Extradition ought only to take place between nations which have mutual confidence in the impartial administration of justice by each other's courts. Without such confidence we should not surrender even a foreigner; with it we have no right to assume that the other state will break faith with us or will deal unjustly with one of our subjects. By refusing to deliver up our own subjects we allow criminals to escape unpunished. It is more convenient that a man should be tried in the country whose law he has broken; and by that law the punishment should be determined. The expense and inconvenience of bringing the witnesses to the country of the accused would be very great; and taking their evidence in a written form would be a most unsatisfactory mode of procedure in criminal matters, and would be disadvantageous to the accused by affording him no opportunity for cross examination or inquiry into the character of witnesses. On the whole, the commission unanimously were of opinion that it is inexpedient that the state should make any distinction in this respect between its own subjects and foreigners; and stipulations to the contrary should be omitted from all treaties.

SOMEBODY in Pennsylvania, dissatisfied with the way the judges of that state arrive at their conclusions, announces the publication of a new series of reports, and presents some specimens of the fictitious cases to the profession, two of which the *American Law Review*, in its last issue, reprints. One of these, Silas Tompkins v. Commonwealth, is very amusing. The *syllabus* reads as follows: "1. A defendant may be convicted by poisoning on an indictment which charges a murder by a clasp-knife. 2. It is no objection to a conviction that it nowhere appears in the record that the judge before whom the case was tried was duly commissioned by the Governor. 3. It is not error to ask a prisoner, when called up for sentence, 'what he has to say why judgment should not be pronounced,' etc., instead of 'whether he has anything to say," etc. 4. The course of the administration of criminal practice can not be stopped for six cents." The opinion of the court is after this style: "The defendant below was found guilty of the gratuitous murder of a mother and her ten children, under circumstances of useless and offensive barbarity. We were quite prepared to hear his counsel arguing that the conviction was erroneous, and their client innocent. It is always so in aggravated cases. But with the innocence of Tompkins, we, as a court of error, have really nothing to do. Law is the hypothenuse of a right-angle triangle, of which logic and moral philosophy are the other two sides. Though it touches them each at one point, its general direction is quite distinct. Mistakes will happen, of course, in our judicial system, as accidents do on our railways; but we can do without neither the one nor the other. Each usually carries its passengers in safety; and when the wrong man is now and then hung or blown up, he must console himself with the reflection that he is a sacrifice to the necessities of society. With the law of this case alone it is our province to deal. We find here the usual parade of exceptions, and points and assignments of error, and a paper book encrusted with authorities like barnacles. Everything that the ingenuity of counsel could suggest has been done to confuse and complicate the design of the case, in the hope, perhaps, that the prisoner, concealed by the dust of argumentation, might escape in a sort of legal disguise. But the eyes of justice are too quick for that sort of thing, and we, as her ministers, will block any such game without remorse. * * * In the case of Sargent v. Coffin, 12 Mass. 315, it was properly decided that an erection on a navigable river was a nuisance; and in Smith v. Mildmay's Adm'r, 31 Ala. 410, it was held that notice to the indorser of a note of its dishonor might be waived. I need not refer to the rule in Shelley's case, 1 Rep. 88, nor to the well-known Woodworth Patent case of Wilson v. Barnum, 8 How. (U. S.) 253. These, and other decisions which it would be mere pedantry to cite, show that the plaintiff in error has no cause to complain of the charge of the court. The other errors are merely supernumeraries, joined to the principal characters in order to give them an air of fictitious importance on the stage. We shall do the prisoner no wrong by disregarding them. A criminal, at his trial, plays at pitch-and-toss with the law for his life, and, if he loses, he must pay the stakes. It is too late to contest here the minor points of the game, which ought to have been settled as it went on. Judgment affirmed."